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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 45 and 46

FEDERAL POWER COMMISSION,

Petitioner,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Respondents.

NATIONAL COAL ASSOCIATION, ET AL.,

Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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October 21, 1960.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	16
ARGUMENT	
Introduction	23
I—The Commission exceeded its authority under the Natural Gas Act when it prohibited, in violation of Section 1(b) of the Act, the non-jurisdictional sale by producers in the field to Con Edison through the device of refusing to certificate the concededly unobjectionable transportation of such gas by an interstate pipeline company	26
II—The Court of Appeals correctly held that the Commission had exceeded its authority in denying a certificate upon the secondary or "non-determinative" ground that it had authority over and disapproved of Con Edison's non-jurisdictional use of its natural gas	39
III—The Commission's order is arbitrary, capricious and unlawful because it is based upon "policy considerations" that are unsupported by any substantial evidence of record and contrary to experience and reason and to the express policies of Congress	58
IV—The Court of Appeals correctly ordered the cases returned to the Commission with directions to issue the certificate applied for	66
CONCLUSION	68
APPENDIX	1a

TABLE OF CASES CITED

PAGE

Associated Press v. *United States*, 326 U. S. 1 (1945) 34

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U. S. 378 (1959) 32, 36

Capital Transit v. *Public Utilities Commission of District of Columbia*, 213 F. 2d 176 (D. C. Cir. 1953) 60

Champlin Refining Co. v. *Corporation Commission of Oklahoma*, 286 U. S. 210 (1932) 46

Charleston & Western Carolina Railway Co. v. *Federal Power Commission*, 234 F. 2d 62 (1956) 55

City of Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741 (D. C. Cir. 1956) 33

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U. S. 581 (1945) 35

Colorado Interstate Gas Co. v. *Federal Power Commission*, 185 F. 2d 357 (3rd Cir. 1950) 36

Department of Conservation v. *Federal Power Commission*, 148 F. 2d 746 *cert. denied* 326 U. S. 717 (1945) 55

Eastern States Retail Lumber Dealers' Association v. *United States*, 234 U. S. 600 (1914) 34

Federal Power Commission v. *East Ohio Gas Company*, 338 U. S. 464 (1950) 56, 57

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) 18, 33, 36, 51, 56, 57, 61

Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949) 18, 31, 37

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959) 34

Mississippi River Fuel Corp. v. *Federal Power Commission*, 163 F. 2d 433 (D. C. Cir. 1947) 59

National Coal Ass'n v. *Federal Power Commission*, 191 F. 2d 462 (D. C. Cir. 1951) 54, 55

PAGE

Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 169 F. 2d 881 (D. C. Cir. 1948) 33

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U. S. 507 (1947) 18, 26, 29

Public Service Commission of the State of New York v. Federal Power Commission, appeal docketed, No. 15412, D. C. Cir., 1960 .....17, 24

Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 (1940) 46

Walls v. Midland Carbon Company, 254 U. S. 300 (1920) 46

Federal Power Commission Cases

East Tennessee Natural Gas Co., 8 F.P.C. 836 (1949), aff'd sub nom., *National Coal Ass'n v. Federal Power Commission*, 191 F. 2d 462 (D.C. Cir. 1951) 54

Cities Service Gas Co., 17 F.P.C. 516 (1957) 55

Houston Texas Gas & Oil Corp., 16 F.P.C. 118 (1956) 55, 63

Memphis Natural Gas Company, 4 F.P.C. 197 (1944) 55

Midwestern Gas Transmission Company, 21 F.P.C. 653 (1959) 27, 62

Mississippi River Fuel Corp., 12 F.P.C. 109 (1953) 55

Northern Natural Gas Co., 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948) 55

Northern Natural Gas Co., 15 F.P.C. 682 rev'd 15 F.P.C. 1634 (1956), *aff'd sub nom., National Coal Ass'n v. Federal Power Commission*, 247 F. 2d 86 (D.C. Cir. 1957) 55

Panhandle Eastern Pipe Line Co., et al., 15 F.P.C. 46 (1956) 18, 36

Panhandle Eastern Pipe Line Co., F.P.C. Opinion No. 274 (1954), *aff'd on other grounds, sub nom., Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 232 F. 2d 467 (3rd Cir.) *cert. denied* 352 U. S. 891 (1956) 55

PAGE

Piedmont Natural Gas Corp., 9 F.P.C. 629, 70 (1950) 55

Southern Natural Gas Co., 14 F.P.C. 243 (1955) *aff'd sub nom., Charleston & Western Carolina Railway Co. v. Federal Power Commission*, 234 F. 2d 62 (D. C. Cir. 1956) 55

Tennessee Gas and Transmission Company, 3 F.P.C. 574 (1943) 50

Texas Gas Transmission Corp., 10 F.P.C. 391 (1951) 55

Texas Gas Transmission Corp., 12 F.P.C. 658 (1953) 54, 55

Texas Gas Transmission Corporation, 22 F.P.C. 378 (1959) 25

The Montana Power Company, 10 F.P.C. 950 (1951) 14, 33

Transcontinental Gas Pipe Line Corp., 11 F.P.C. 605 (1952) 54, 55

Transcontinental Gas Pipe Line Corporation, 20 F.P.C. 843 (1958) 63

Transcontinental Gas Pipe Line Corporation, F.P.C. Docket No. G-16603 67

Trunkline Gas Company, 21 F.P.C. 704 (1959) 27

Statutes

Administrative Procedure Act §9, 60 Stat. 243 (1946), 5 U. S. C. §1009 59

Air Pollution Control Act of 1955, 69 Stat. 322, 42 U. S. C. §§1857-1857g (1957) 9, 19

Natural Gas Act, 52 Stat. 824 (1938), as amended, 15 U.S.C. §§717-717w 5, 19, 20, 38, 40, 42, 46, 56, 64

1(b) 3, 16, 17, 18, 23, 24, 26, 29, 30, 34, 37, 39, 41, 45, 53

7 3, 15, 16, 18, 24, 29, 30, 36, 37, 39, 41, 47, 48, 50, 52, 53

4 37, 45, 56

5 37, 56

11 20, 41, 42, 43, 45, 57

19(b) 59

Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1-7, 15 (1952) (Supp. IV, 1957) 34

Miscellaneous

	PAGE
Att'y Gen. Nat'l Comm. Antitrust Rep. (1955)	33
81 Cong. Rec. 6726 (1937) (Remarks of Congressman Mapes)	43
81 Cong. Rec. 9312 (1937) (Remarks of Senators Austin and Wheeler)	43, 44
20 FPC Ann. Rep. (1940)	46, 47, 48, 51
31 FPC Ann. Rep. (1951)	39, 52
32 FPC Ann. Rep. (1952)	39, 52, 53
33 FPC Ann. Rep. (1953)	39, 52, 53
34 FPC Ann. Rep. (1954)	39, 52
35 FPC Ann. Rep. (1955)	39, 52
36 FPC Ann. Rep. (1956)	39, 52
37 FPC Ann Rep. (1957)	39, 52
38 FPC Ann Rep. (1958)	39, 52
39 FPC Ann Rep. (1959)	39, 52
FPC Brief in *Public Service Commission of the State of New York* v. *Federal Power Commission*, *appeal docketed*, No. 15412 (D. C. Cir.)	17, 24
FPC, The First Five Years Under The Natural Gas, (1944)	50
FTC, *Final Report to the Senate of the United States*, S. Doc. No. 92, 74th Cong., 1st Sess., Part 84-A (1936)	44
Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong. 2d Sess. (1936)	45
Hearings Before House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. (1941)	48
H. R. Rep. No. 1290, 77th Cong., 1st Sess. (1941)	36, 49
60 Pub. Util. Fort. 843 (1957)	63
S. 2252, 86th Cong. (1959)	59
Senate Concurrent Resolution 73, 86th Congress (1959)	54

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BRIEF FOR RESPONDENT CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Questions Presented

Consolidated Edison Company of New York, Inc. ("Con Edison"), a New York electric, gas and steam utility, contracted with natural gas producers in Texas for the direct purchase of a long term firm supply of natural gas. This gas was to be used as fuel in place of coal by Con Edison in its Waterside steam and electric generating station in the heart of Manhattan in order to combat a serious air pollution problem. It was not to be resold. The purchase of the gas, since it would not involve a sale for resale, was not subject to the jurisdiction of the Federal Power Commission ("Commission"). Nor would Con Edison's subsequent utilization of its own gas in New York City be subject to Commission jurisdiction.

Transcontinental Gas Pipe Line Corporation ("Transco"), Con Edison's principal natural gas supplier, which was planning to enlarge its facilities, contracted to enlarge them further and use them to transport the gas for Con Edison's account.

Transco also agreed that, for not to exceed 60 days in any year, it would reduce the transportation of Con Edison's gas, at Con Edison's election, and would supply from Transco's own reserves a like amount of gas which Con Edison could use for resale during times of peak demand by its consumers. This peaking gas for resale is sometimes referred to herein as the "60-day peaking gas."

This entire program, known by its tariff designation as "X-20", was designed to enable Con Edison to accomplish two vital objectives:

(1) Abatement of air pollution in the vicinity of the United Nations; and

(2) Securing additional gas service for its gas customers during periods of their greatest need.

The Federal Power Commission refused to permit the transportation of Con Edison's gas by pipeline from Texas to New York, although it had no objection to Transco's sale of the 60-day peaking gas or to the transportation arrangement itself. The Commission denied the pipeline certificate for two reasons. First, and primarily, it did not approve of Con Edison's non-jurisdictional purchase in Texas prior to the commencement of transportation. Second, it did not approve of the proposed use of the gas in New York subsequent to its transportation. The Commission said that the latter reason was not "determinative".

The questions presented are:

(1) Has Congress vested in the Federal Power Commission the power to regulate, prohibit or prevent, by direct or indirect means, a sale of natural gas for consumption by the purchaser, which sale is exempted from Commission jurisdiction by §1(b) of the Natural Gas Act?

(2) Is the Commission's power under §7 of the Act over the issuance of certificates of convenience and necessity to a transporting pipeline so unlimited in scope that it may deny a certificate for reasons having no relevancy to such transportation, but which relate to the non-jurisdictional purchase of natural gas and the subseqent consumption by its owner?

(3) May the clause "required by the present or future convenience and necessity" in §7(e), governing issuance of certificates, be construed so broadly that it permits FPC regulation of transactions expressly exempted from such regulation by §1(b) of such Act?

(4) Has the Federal Power Commission acted arbitrarily in denying a certificate of public convenience and necessity solely on the basis of "policy considerations"

that are unsupported and unrelated to any substantial evidence of record, and are contrary to reason and the expressed policies of Congress, and where the only evidence of record demonstrates the need for natural gas to relieve air pollution in a highly developed metropolitan area and to realize substantial economies in the rendition of utility service to the public?

Statement of the Case

The statements in the briefs of the Federal Power Commission and of the National Coal Association, United Mine Workers of America and Fuels Research Council, Inc. (sometimes referred to herein as "the coal interests" or "coal") do not in our view accurately set forth the record before the Commission, the nature of the issues or the scope and nature of the Commission's actions as stated by it.* In fact much of Petitioners' briefs is based on

* In addition to the briefs filed by the Petitioners, the Commission and the coal interests, several briefs *amici curiae* were also filed with the Court by the Southern California Gas Company and Southern Counties Gas Company of California, the State of California, the State of Wisconsin and the Public Service Commission of the State of Michigan. No arguments of substance are made in the briefs of the coal interests and the briefs of the *amici curiae* that are not covered in the 86 page brief of the Commission. We therefore will avoid repetition by directing our attention in this brief almost solely to the Commission's brief.

The arguments advanced in the briefs of the coal interests are repetitious of those in the Commission's brief. The purpose of the coal interests, as in prior proceedings, is clearly to limit as far as possible, use of any competing fuel. The coal interests offered no evidence, however, at the hearing with respect to the impact of the proposed X-20 service upon the market for coal.

The briefs of the State of California, the State of Wisconsin, the Public Service Commission of the State of Michigan, and the Southern California Gas Company and its affiliate add nothing to the arguments made in the Commission's brief and appear to misapprehend the significance of recent decisions of this Court with respect to the legal issues presented in this case which have never been directly passed upon by this Court or any other Court, except for the decision of the 3rd Circuit herein.

reports, news articles and factual interpretations which are not only wholly outside the record, but were not, and in part could not, have been considered by the Commission as a basis for its action.

Particularly Petitioners' briefs seek to excuse the Commission in ignoring the comprehensive record as to need of the X-20 service and seek to create the impression that ameliorating air pollution is merely a make-weight argument to cover up an allegedly anti-social "industrial use" of Con Edison's purchased gas.

We recognize that if the Court accepts the interpretation of the Natural Gas Act as found by the Court of Appeals, the claims of benefit or of detriment to the public interest, are not reached for decision. On the other hand, if this Court reaches the question of the arbitrary character of the Commission's action it must decide that question upon the evidence of record.

We believe that the basic issue of Commission jurisdiction has to be considered in the light of the actual program as contained in the record and the Commission's decision must be judged by the factors which it stated in its two decisions had determined its action—not by some new and different reasoning now advanced for the first time in its behalf by counsel in the "Commission" brief herein.

Transco's X-20 service had its genesis in a number of circumstances: the conclusions of the Board of Air Pollution Control of New York City and Con Edison that a year-round, firm supply of natural gas would be the only satisfactory means of substantially reducing stack emissions at the Company's Waterside station (R. 9a, 50a), the inability of Transco (because of tariff restrictions) to provide the needed firm supply (R. 154a-157a), and Con

Edison's need for the 60-day peaking gas to meet the peak needs of its customers during the winter heating season (R. 5a).

To obtain a firm supply of gas for its Waterside station, Con Edison, with Transco's cooperation, contracted for the purchase of 50,000 Mcf of gas per day from producers in Texas and Transco agreed to expand its facilities, beyond those then planned, sufficiently to transport this volume of gas to New York (R. 5a). To supply Con Edison's need for peaking gas, Transco additionally agreed to substitute its own gas for the transportation gas upon request for up to 60 days in the year (R. 5a).

The purchase of gas by Con Edison in Texas for its own use admittedly is not subject to Commission jurisdiction. The use by Con Edison of its gas in New York City similarly is non-jurisdictional. The transportation of such gas in interstate commerce by Transco and Transco's sale of the 60-day peaking gas to Con Edison for resale, however, require Commission authorization. The Commission denied Transco's application for a certificate of public convenience and necessity because it did not approve of Con Edison's proposed non-jurisdictional purchase and, incidentally, its proposed non-jurisdictional use. The Commission did not find fault with the jurisdictional transportation service as such* or with the 60-day peaking service.

On review, the Court of Appeals for the Third Circuit held that the Commission had exceeded its jurisdiction in attempting to regulate the purchase of the gas by its attempted exercise of a general allocation and conserva-

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*With the exception of one minor rate question which did not bear upon its ultimate decision (R. 178a).

tion power it did not possess. The Court also disagreed with the Commission's characterization of the proposed use to generate and distribute electricity and steam, as "inferior".

The record with respect to the realization of the two separate objectives of the X-20 service in transporting Con Edison's own purchased gas and providing the 60-day service shows:

Transportation of Con Edison's gas to combat air pollution

The Commission has persistently refused to recognize the stack emissions at the Waterside plant as anything more than a minor annoyance. The Commission's brief herein now complains that there are no studies as to "actual damage" caused by Waterside and that the part the Waterside station plays is not related to the City's total air pollution problem. What other studies would be required to convince the Commission of what is already plain upon the face of the record we do not know.

The record shows that the burning of coal at the Waterside station results in the emission from its stacks of 27,000 lbs. of fly ash and more than 42,000 lbs. of sulphur dioxide each day (R. 27a, 42a). The particulate emissions are seen with the naked eye. The sulphur dioxide is offensive to the nostrils. The larger pieces of particulate matter rain on the passerby and on occasion the plume of smoke envelopes adjoining buildings such as the United Nations, causing discomfort to the skin and irritation of the respiratory system of exposed observers (R. 48a, 52a, 116a). Bitter complaints about stack emissions have been received for many years. As long ago as 1950, when the United Nations building was being constructed just to the north of the Waterside station, Trygve Lie, then Secretary

General of the United Nations, complained to the Mayor of New York City about this "serious and potentially dangerous condition" (R. 47a). The Mayor considered the complaint to be serious enough for him to communicate with President Truman about the matter (R. 159a-163a). As recently as immediately prior to the hearing in this proceeding Mayor Wagner of New York received a petition from 1,855 tenants of the nearby Tudor City apartments complaining about the dust, fly ash and sulphurous odors (R. 47a).

If the foregoing direct evidence of the Waterside stack emissions gained by observers through the senses of sight, smell and touch is not enough, the record discloses that the Department of Air Pollution Control under the direction of its Commissioner, Leonard Greenburg, carefully measured for eight months the quantity of particulate matter accumulating in the immediate vicinity of the Waterside station, as contrasted with other areas. This study showed that fly ash and carbon were accumulating around the station at the monthly rate of 180 tons per square mile as compared to an average for the whole city of 70 to 75 tons (R. 115a-116a). The particulate matter collected near the Waterside station during this study was photographed, examined microscopically and was identified as having emerged from the Waterside stacks (R. 115a-116a).

The Commission's criticism in its brief of the uncontradicted testimony of Dr. Greenburg, one of the leading authorities in the world on the subject of air pollution is niggling. Dr. Greenburg reviewed the problem of air pollution in the metropolitan area in general and in the vicinity of the Waterside plant in particular. He subscribed to the conclusions of the Interstate Sanitation

Commission as to economic losses caused by air pollution in the New York-New Jersey area and the fact that health may be adversely affected thereby (R-40a-41a). He concluded that the presence of the fly ash and sulphur dioxide mitted froin the Waterside station was detrimental to health and that the only practical solution lay in conversion to natural gas (R. 48a, 50a). He referred to Public Law 159 of the 84th Congress* which declared it to be a national policy, obligatory on all agencies subject to its will, to take steps to reduce air pollution (R. 39a). He pleaded with the Commission "not [to] overlook the fact that the very air we breathe is perhaps our most precious natural resource [which] is not replaceable" (R. 53a).

The Commission apparently does not quarrel with the general premise that air pollution is economically detrimental and may undermine health. The Commission does not dispute the fact of the vast volumes of contaminants released into the air each day by the Waterside station. The nub of its contention appears to be that Dr. Greenburg did not demonstrate that a particular structure was corroded, or that a particular respiratory disease was caused directly by the Waterside plant. Whether such facts would ever be susceptible of conclusive proof we do not know. What is perfectly clear, however, is that a substantial reduction in stack emissions at the Waterside station would also substantially reduce the air pollution in the vicinity of the station, which the record shows far exceeds the average pollution level in the remainder of the City of New York (R. 52a). This cleaning up of the "envelope of air [which] we cannot afford to * * * [have] become polluted to any

* Air Pollution Control Act of 1955, 69 Stat. 322, 42 U. S. C. §§1857-1857g.

great degree" (R. 53a) in one of the most densely populated areas in the world would be an important step, even if not a totally complete means of preserving the health and comfort of those now working and living in midtown Manhattan.

Commissioner Greenburg's conclusion that the use of natural gas at boilers 71 and 72 of the Waterside station provides the only "practical solution" of effectively reducing stack emissions (R. 50a) is borne out by Con Edison's long struggle with the problem. The Commission brief suggests by implication that Con Edison could have solved the problem in other ways (FPC Brief, pp. 7-8). This is contrary to all the testimony and has no foundation in the record.

In 1950, exhaustive wind tunnel tests were conducted to determine whether increase in stack height might be a solution. The results of these tests indicated that an increase in height was not justifiable, and in any event the Company was limited in the height to which its stacks could be raised by regulations (R. 87a-88a).

Mechanical dust collectors and electric precipitators have been installed in series at great expense. Approximately $3,600,000 was spent at the Waterside plant alone to control stack emissions (R. 49a-50a). Because of the location of the plant and ground space limitations, further expenditures for additional dust collecting equipment at Waterside are not feasible (R. 50a). Oil as a fuel in the most troublesome boilers, numbers 71 and 72, has been considered and rejected because of inadequate storage facilities and the hazards to operating personnel. Furthermore, it would not reduce the quantities of sulphur dioxide emitted (R. 74a).

To cure the problem without changing from coal would require a $12,000,000 rebuilding job on the two boilers that contribute most heavily to stack emissions. Aside from the exorbitant cost, each boiler would have to be removed from service for two years in succession. This means that it would be impossible for Con Edison to maintain adequate electric and steam service to the public in the area for approximately four years without these boilers (R. 15a-16a).

Other Benefits of the X-20 Service

Transco's proposed X-20 service would render benefits not only to the many thousands of New Yorkers who would no longer be subjected to the fly ash and sulphur dioxide emitted from the stacks of Con Edison's Waterside station, but it would also provide positive economic benefits to Con Edison's more than 2,800,000 electric customers, 2,000 steam customers* and 1,300,000 gas customers.

The savings to Con Edison's electric and steam customers which could be expected from institution of the X-20 service were presented at the hearing. The evidence showed that as compared with the cost of rebuilding the offending boilers for use with coal, the cost of bringing natural gas to the Waterside station would be about $9,650,000 less. The operating savings which would result from the use of gas would total about $1,820,000 additional annually (R. 143a, 144a).

The savings to Con Edison's gas customers, although not susceptible of exact computation, would be substantial. During up to 60 days in each year Transco agreed to substitute for Con Edison's Texas gas, at Con Edison's

* Most of these are office and apartment buildings furnishing heat to large numbers of tenants.

election, up to 50,000 Mcf of natural gas from Transco's own reserves. The natural gas supplied by Transco would not be used in the Waterside station, but would be resold by Con Edison to its gas customers during the cold weather periods of the year, when the needs of such customers are at their peak.

In order to reduce the Waterside stack emissions on a year round basis, Con Edison planned to utilize, as an operating routine, 25,000 of the 50,000 Mcf in the two most troublesome of the ten Waterside boilers at all times; and up to 60 days it planned to call on Transco to replace up to 25,000 Mcf to meet the peak needs of its gas customers. However, in the event of an emergency the entire 50,000 Mcf of Transco's replacement gas would be available for distribution to Con Edison's gas customers (R. 10a).

Con Edison's gas customers would receive a valuable peaking service during the cold weather when the gas would be most needed, at the same low cost as other gas purchased by Con Edison from Transco on a year round 100% load factor basis. At present prices this would mean that the cost of the X-20 peaking gas would be roughly half of what the same gas would cost if purchased under a storage* or peaking tariff. This low cost for peaking gas is the direct result of the fact that the facilities used to supply such gas will be fully utilized during the entire year. Since the cost of such facilities is borne during most of the year by the transportation portion of the X-20 service, the cost to Con Edison's gas customers of the peaking service is correspondingly reduced.

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* Storage fields suitable to serve the New York metropolitan area are few in number and at a considerable distance so that the availability of such storage is limited and the service provided is not inexpensive.

The economic factors here are exactly the same as those which have induced the Commission to approve the sale of natural gas by pipelines for true industrial consumption or for utility boiler fuel on an interruptible basis as a means of increasing the load factor "thereby making it possible to provide gas service to domestic consumers who would not otherwise be served, or to do so at lower unit costs than would otherwise be required" (FPC brief, pp. 41-42).

In addition to permitting gas to be supplied cheaply to Con Edison's customers in the winter time the X-20 service has the additional advantage, not enjoyed by most industrial or boiler fuel routinely approved by the Commission, of being supplied from reserves other than those of the pipeline. The reserves from which Con Edison arranged to purchase its gas were reserves which Transco did not wish to purchase because of the escalating effect upon its contractual price provisions with other producers.

Hearing Examiner's Decision

The Hearing Examiner determined that a certificate of public convenience and necessity authorizing construction and operation of the X-20 facilities should be issued to Transco.

The Examiner concluded, as did the lower Court, that there was no jurisdictional basis for inquiry by the Commission into the proposed use to be made of the natural gas purchased by Con Edison in Texas. The Examiner pointed out that if Con Edison had been able to use its gas in Texas the Commission would have had no authority to interfere with such use, and if Con Edison had arranged for the transportation of the natural gas to New York by

other means such as carriage in a refrigerated state by barge or tank car, the Commission would have had no interest in or right to examine Con Edison's purchase or proposed use of such gas (R. 170a-171a).*

The Examiner could find no objection to the transportation service, and in fact found that "there is no evidence of any prospective adverse effect by reason of this proposed transportation service on any of Transco's regulated activities" (R. 171a).

The Examiner dismissed as irrelevant the contention that other distribution companies might follow Con Edison's example. He said that if there were anything harmful to the public involved in such activity it was the function of Congress and not of the Commission to provide for regulation or even prohibition of such activity (R. 171a).

The Examiner's order granted the certificate of public convenience and necessity for these reasons.

The Opinion of the Commission

The Commission, however, reversed the Examiner and denied the certificate. The Commission found that the "conventional requirements of public convenience and necessity"** had been met (R. 178a, 215), but reversed its Examiner on the basis of what in essence were two "policy considerations".

First, it objected to the purchase in the field by a non-pipeline company of natural gas for consumption by the

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* The Commission itself has decided it has no jurisdiction over the interstate transmission of natural gas for consumption by the direct purchaser where the pipeline is provided by such purchaser. *The Montana Power Company*, 10 F.P.C. 950 (1951).

** Meaning those standards it had universally applied in its prior administration of the Act since 1938.

purchaser. A number of purported reasons were advanced in support of this objection by the Commission. Neither the objection nor the supporting reasons had ever previously been stated by the Commission in any decision. None of the reasons was supported by any evidence of record, nor, as we shall show, were any of the Commission's grounds based upon the Commission's experience in matters outside of the record of this proceeding.

Second, the Commission did not approve of Con Edison's proposed use of natural gas for the generation of electricity and steam for distribution at its Waterside plant for the purpose of minimizing stack emissions. Apparently it had some nebulous belief that the denial would force this gas to be transported and sold to gas customers somewhere in the nation, and if such use should eventuate it was deemed to be "superior". All of the evidence of record relating to the proposed use of Con Edison's natural gas, however, demonstrated that such use would be beneficial to Con Edison's gas, steam and electric customers, as well as to those persons living and working in midtown Manhattan.

The Commission admitted, however, that the planned end use was "but one factor and that not of determinative importance" (R. 189a).

Commissioner Hussey dissented on the ground that all of the usual tests of Section 7 of the Act had been met, that there was no evidence that the X-20 service would deprive any customer of Transco of any needed service, and that the majority opinion ignored precedent, went beyond the record, and some of its conclusions were not sustained by the evidence (R. 215-217).

The Decision of the Lower Court

The Court of Appeals set aside the Order of the Commission and returned the proceedings to the Commission with orders to issue the certificate applied for subject to further hearing on a minor rate question (R. 324).

The Court reviewed these basic objections, held that the Commission had gone beyond its Congressional authority in denying the certificate, and characterized what the Commission had done as the assertion of "a general allocation and conservation authority over the natural gas fields of the United States" (R. 312a). It found that the Commission's attempt to limit purchases of natural gas in the field to pipeline companies alone "puts a consideration into the statute which the Congress did not envisage. See §1(b) of the Act" (R. 323a). The conclusions of the Court were based upon a thorough analysis of the legislative history of the Natural Gas Act, pointing out particularly that the Commission had repeatedly asked Congress for the specific authority it was here attempting to exert and Congress each time had denied the grant.

Summary of Argument

The Federal Power Commission has employed its §7 certificate power over the interstate transportation of natural gas to invade areas outside its jurisdiction and, specifically, to bar Con Edison from purchasing natural gas from producers in the field, and to prevent Con Edison from using its own gas in New York City. The Commission achieved these results by refusing to permit Transco to transport Con Edison's gas from Texas to New York although it did not object to the transportation service itself.

The Commission premised its denial of a certificate to Transco on two grounds: Primarily, the Commission disapproved of Con Edison, or any out-of-state purchaser other than an interstate pipeline, buying natural gas directly from producers in the field; and secondarily, the Commission objected to Con Edison's plan for using its gas at its Waterside electric and steam generating station to combat air pollution in the mid-Manhattan area. Both the purchase in the field by Con Edison and its use of its own gas in New York are exempted from Commission jurisdiction by §1(b) of the Act.

The Commission's brief avoids discussing what it has actually done, although in its brief in another judicial forum it has candidly stated that it denied the X-20 transportation certificate in order to "foil" Con Edison's purchase of natural gas in the field.* The Commission's attempt to frame the question before this Court in terms of what it may "consider" in a pipeline certificate case avoids the real issues. Whatever euphemisms are employed, the plain fact of the matter is that the Commission intended to and did defeat Con Edison's purchase of gas in the field and with similar deliberate intent prevented Con Edison from using its natural gas at its Waterside station to combat air pollution.

I

The direct sale of natural gas to Con Edison for its own consumption is excluded from Commission regulation by §1(b) of the Act. Congress delegated to the Commission authority over only three things: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. Direct

* F.P.C. Brief in *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir. No. 15412. See first footnote on p. 24 *infra*.

sales for consumptive use are specifically excluded from Commission jurisdiction by §1(b) of the Act, and this Court has so held (*Panhandle Eastern Pipe Line Co.* v. *Public Service Company of Indiana*, 332 U. S. 507 (1947)).

The Commission in its brief concedes that "Con Edison's purchase and industrial use * * * are not in themselves regulable by the Commission" (FPC brief, p. 20). It describes the purchase, sale and use of the gas by Con Edison as being "wholly outside the rate-setting and other powers of the Commission" (FPC brief, p. 21). The Commission contends, in effect, however, that although it could not order Con Edison to cease purchasing gas in Texas, it can reach the same result by refusing to permit Transco, a pipeline subject to its jurisdiction, to transport Con Edison's gas to a location where it can be used by its owner. This flies in the face of established law, recognized both by this Court and the Commission itself, that the Commission cannot accomplish by indirect means what it lacks the power to do directly (*FPC* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944); *Panhandle Eastern Pipe Line Co. et al.*, 15 FPC 46 (1956)).

The plain and unambiguous wording of the Natural Gas Act and its legislative history refute any claim that it was the intention of Congress when it enacted §7 to provide the Commission with a weapon that could be used to strike down, as it has in this case, matters expressly exempted from its jurisdiction. This Court has specifically held that §1(b) of the Act delineates the Commission's jurisdiction and the limitations there prescribed cannot be extended by the Commission through the exercise of its powers under §7 of the Act in violation of such limitations. In short, §7 certification may not be employed as a means of regulating in areas specifically exempted by §1(b) of the Act (*Federal Power Commission* v. *Panhandle*

Eastern Pipe Line Co., 337 U. S. 498 (1949)). In that case this Court noted that any extension of the Commission's powers must be provided by Congress. In fact, on a number of occasions since that time the Commission has unsuccessfully asked Congress for the powers it now seeks to exercise.

Not only did the Commission err in attempting to prevent Con Edison from purchasing natural gas in the field, but in addition, the policy it hoped to effectuate, i.e., the exclusion of all interstate purchasers other than pipelines from the producing fields, runs counter to the policy of the antitrust statutes. There is no foundation, either in the Act or its legislative history, to support the position that Congress intended to grant pipelines a monopoly in the interstate natural gas market. To the contrary, all expressions of Congressional intent have favored competition among purchasers and one of the concerns of the framers of the Natural Gas Act was the allegedly monopolistic position of the interstate pipelines.

II

The Congressional limitation on the Commission's authority applies with equal force to Con Edison's use of its Texas-purchased natural gas to relieve air pollution in mid-Manhattan. The Commission's attack upon Con Edison's non-jurisdictional use of its gas was premised upon the conclusion that such use was "inferior", a conclusion with which the lower Court did not agree and which is contrary to the policy expressed in the Air Pollution Control Act of 1955*. The Commission made it clear, however, in accordance with its own previously expressed views, that it did not consider this ground of its decision to be "determinative".

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* 69 Stat. 322, 42 U. S. C. §§1857-1857(g).

The Natural Gas Act does not give the Commission the power to interfere with the lawful use by Con Edison of its natural gas. Congress has nowhere, either in the Natural Gas Act or in any other statute, enacted a national fuels policy. The Natural Gas Act itself does not favor one locality, use, or user over another. The only "conservation powers" granted the Commission in the Act are those ministerial duties in aid of State action set forth in §11.

The legislative history of the Natural Gas Act bears out the conclusion that Congress did not delegate to the Commission any conservation power, including control of end use. The Commission in reports published subsequent to the 1938 Act and the 1942 amendments thereto recognized this fact. During the past 10 years the Commission has repeatedly and with uniform lack of success asked Congress to grant it the very powers it has tried to exercise over Con Edison's use of its gas. In view of the language of the Act, its legislative history and the record of Congressional denials of Commission requests, it is clear that Con Edison cannot be deprived by the Commission of its right to use the natural gas it lawfully purchased in Texas as a substitute for coal in the operation of its Waterside plant.

III

The Commission's order in this proceeding is arbitrary and unlawful. It is purportedly based upon "policy considerations" that are unsupported by any substantial evidence of record. Not only is there nothing in the record to support the Commission's policy conclusions, but they are clearly erroneous in that they are contrary to experience, reason and the policies of Congress.

All of the evidence presented at the hearing was in support of the proposed X-20 service. It was shown that the transportation of Texas gas would not only relieve the air pollution problem in midtown Manhattan, but also that it would result in savings to Con Edison's electric and steam customers. The value of the 60-day peaking service to Con Edison's gas customers in terms of economy and reliability of service was also demonstrated. No evidence was adduced in opposition to the X-20 proposal. The Commission, however, has virtually ignored the record and improperly attempted to substitute "expertise" for evidence.

An attempt has been made in the Commission's brief to shore up the groundless conclusions adopted by the Commission, but there are simply no facts to support the Commission's basic conclusion that certification of the X-20 service would open up a vast new unregulated interstate market for boiler fuel.

The Commission pointed in its brief to only two instances in its entire history, other than this case, in which a consumer purchased natural gas in the producing fields for its own use, arranged for its interstate transportation to the point of consumption and submitted the proposed service to the Commission for its approval. One of these projects was abandoned as uneconomic; the other was certificated by the Commission.

The striking absence of proposals of this type in the Commission's files points up the fact that the decision as to what fuel to use for industrial purposes is dictated by unyielding economic considerations. Absent special circumstances, like Con Edison's air pollution problem and its need for peaking gas, the purchase of natural gas

in the field at the present high price levels, plus the cost of long-distance transportation, render such an arrangement unattractive to the ordinary industrial user who can obtain fuel, coal, oil or pipeline gas at a cost less than that involved in an X-20 type service.

The Commission has failed in its orders and in its brief to demonstrate by any facts, within or without the record, that its speculation and conjecture have a rational basis. Without support for its conclusions, its orders must fall as arbitrary and unlawful.

IV

The judgment of the lower Court, directing that this case be returned to the Commission "with directions to issue the certificate applied for", should be affirmed. The Commission made it clear in its original order that it had no objection to the proposed X-20 service* except for the policy considerations which did not relate to the transportation service. Specifically, the Commission found that all of the established requirements of public convenience and necessity had been met (R. 178a, 215). Since the lower Court found that the Commission could not properly rely upon any of the "policy considerations" as the basis for its decision, and since all the established requirements for a certificate had been met, there was no need for further hearing or exercise of the Commission's certificate powers except for the issuance of the certificate applied for as directed by the Court.

* Aside from a minor rate question.

ARGUMENT

Introduction

The Commission premised its denial of Transco's application to render the X-20 service, primarily on "policy considerations". None of the "policy considerations" relate to the merits or demerits of the combined transportation and peaking service which Transco proposed to render, but amount to an attempt to control a transaction which Congress in §1(b) had clearly exempted from the Commission's jurisdiction.

The Court of Appeals dealt with each "policy consideration" separately, showing that most are based upon the exercise of a non-existent national fuels policy, which would permit the Commission to decide who may buy gas from the producers, i.e., an allocation of natural resources of the states, and how such gas may be used by its owner, i.e., the enforcement of a doctrine of relative superiority and inferiority of end-uses. In our view, the Commission's decision, when reduced to its simplest terms, consists of a dual invasion by the Commission, through the device of denying the pipeline certificate, of two areas clearly outside its jurisdiction: the non-jurisdictional purchase of natural gas in the producing fields, and the non-jurisdictional use of such gas by its owner.

The first, and what the Commission in its opinion indicated was the determinative ground for decision, was the Commission's general policy conclusion that no out-of-state public utility except a natural gas pipeline purchaser should be permitted to buy natural gas from producers in the field. Although the Commission had no jurisdiction in this instance over either the purchaser, Con Edison, or the sales transaction between Con Edison and the

producers, it was able by the indirect means of denying the use of an interstate pipeline to the purchaser to prevent the purchase and, to use its own words, "to foil that transaction"*. This was no mere enlargement of the generality of the phrase of public convenience and necessity in §7(e) as the Commission's current brief now claims. It was a deliberate invasion of the area of regulation exempted by §1(b) because the Commission believed the creation of a monopoly over gas purchases in the hands of interstate pipelines was desirable, putting "a consideration into the statute which the Congress did not envisage".**

The Court of Appeals, having held the Commission to have violated the clear limits of its jurisdiction, properly, and contrary to Point V (pp. 82-86) of the Commission's brief, remanded the matter to the Commission with directions to certificate. Since only Congress could legislate the power attempted to be usurped, there was nothing further for the Commission to act upon.

The secondary objection raised by the Commission to the X-20 service, namely, the nature of the intended use of Con Edison's gas in New York, (also a matter not subject to Commission jurisdiction) has repeatedly been

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* In the Commission's brief filed in the Court of Appeals for the District of Columbia Circuit in July of this year in *Public Service Commission of the State of New York* v. *Federal Power Commission*, appeal docketed, No. 15412 (D. C. Cir.), the Federal Power Commission characterized its own action in this proceeding as follows:

> "One such purchaser, Consolidated Edison Company of New York, Inc., is an out-of-state electric utility which directly purchased gas for boiler fuel. *The Commission's attempt to foil that transaction by denying a transportation certificate* was set aside by the Third Circuit. The Supreme Court has granted petitions for certiorari" (FPC brief, page 11, footnote 23). (Emphasis supplied.)

** See opinion of Court of Appeals (R. 323).

designated by the Commission as a non-determinative factor in its decision, i.e., one which taken alone would not support denial of a certificate.*

The Commission in its current brief before this Court has steadily avoided discussing what it has "done" and has not used the plain words that it has used elsewhere to describe its attempt to "foil" the purchase. Instead its brief now tries to escape from its acts by discoursing broadly along lines of what the Commission might "consider". Whatever euphemisms are employed, however, the plain fact of the matter is that the Commission intended to and did defeat Con Edison's purchase of natural gas in the field and with similar deliberate intent prevented Con Edison from utilizing its natural gas in Manhattan to combat air pollution.** It is the propriety or impropriety of these "acts" which this Court must determine.

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* The Commission in its brief states at page 43: "Actually, the Commission did not consider the end-use issue as controlling its decision in this case; in its order denying rehearing (21 F. P. C. 399, 401) it said (supra, p. 9):

> "Contrary to applicants' contentions, we do not view the proposed end use of the gas involved in this case as of decisive importance. In accordance with the *National Coal Ass'n* case, it is but one factor, and that not of determinative importance, which we consider in the exercise of our judgment on all the facts."

** See *Texas Gas Transmission Corporation*, 22 F.P.C. 378 (1959).

I

The Commission exceeded its authority under the Natural Gas Act when it prohibited, in violation of Section 1(b) of the Act, the non-jurisdictional sale by producers in the field to Con Edison through the device of refusing to certificate the concededly unobjectionable transportation of such gas by an interstate pipeline company.

The Commission's decision to "foil" Con Edison's non-jurisdictional purchase, to bar all utilities and other out-of-state purchasers from the producing fields, and to grant a monopoly in the interstate market for natural gas to pipelines is in direct violation of §1(b) of the Act* and seems to fly in the face of Federal anti-trust statutes. The Court below stated in this regard, "This puts a consideration into the statute which the Congress did not envisage. See §1(b) of the Act." (R. 323(a))

This Court has been explicit in defining those areas over which the Federal Power Commission has been and has not been granted regulatory power under the Natural Gas Act. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507 (1947), this Court

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* "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.* [52 Stat. 821 (1938); 15 U. S. C. §717 (b)]". (Emphasis supplied.)

reviewed the history of the Natural Gas Act and the scope of the Commission's jurisdiction, stating:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." (p. 516)

Plainly, none of these "three things" include direct sales for consumption. In view of the argument in Commission's brief that the 1942 Amendment enlarged the Commission's jurisdiction over such sales, it is noteworthy that the Court's decision was handed down in 1947, after such amendment. This Court stated:

> "The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other* • • • *sale* • • •' (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded." (pp. 516-517)*

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* That the Commission in the instant case had its sights trained on a sale which this Court has declared to be outside the ambit of its authority is underlined by the statement Commissioner Kline made subsequent to the time that he cast his vote against the proposed X-20 service. Commissioner Kline said that in the X-20 case the Commission had denied an application "to permit the *sale* of natural gas for boiler fuel." *Midwestern Gas Transmission Company*, 21 F.P.C. 653, 670 (1959) (dissenting opinion, emphasis supplied.) See also *Trunkline Gas Company*, 21 F.P.C. 704, 725 (1959).

The distinction between those transactions within the jurisdiction of the Commission, i.e., sales for resale and transportation, and those matters reserved to the states, i.e., direct sales for consumptive uses, was recognized by this Court.

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." (p. 517)

On these matters there is no ambiguity in the Act; the power to determine whether a direct sale for consumption is in the public interest has not been delegated to the Commission, and the Commission's usurpation of the authority of the states, by the means of expanding a jurisdictional transaction, which in itself is unobjectionable to the Commission, to regulate indirectly a non-jurisdictional transaction, is in violation of the Act.

While conceding that "Con Edison's purchase and industrial use of the Texas gas are not in themselves regulable by the Commission",* the Commission's brief now contends that it can prohibit the transaction that it cannot regulate, that it can do the greater but not the lesser.

In essence, what the Commission, despite protestations to the contrary, did here was to treat the proceeding before it as though the non-jurisdictional sale by the producers to Con Edison were on trial rather than the proposed transportation and peaking service. In effect, it found

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* FPC brief, page 20.

that this sale was not required by the public convenience and necessity and seized upon a subsequent jurisdictional function—its control over pipeline expansion—to deny a certificate for the concededly unobjectionable transportation service proposed by Transco. The Commission's position that it can thus indirectly regulate a producer's sale for consumption, which is outside its jurisdiction, makes a mockery of the carefully delineated bounds upon Commission jurisdiction set forth in §1(b) and explained in this Court's decision in the *Panhandle Eastern Pipe Line* case, *supra*.

In the absence of any supporting authority bearing directly upon the problem, the Commission in its brief has been forced to ignore §1(b) and fall back on the argument that the broad phrase "present or future public convenience and necessity" contained in §7 of the Act empowers the Commission to "consider" and thereby to regulate a wide range of actions including those expressly excluded from its jurisdiction.

It is not an answer to attempt to stretch and alter the words of §7,* which have been given a uniform meaning

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* Section 7(c), 56 Stat. 83 (1942), 15 U. S. C. 717f(c):

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance

through more than twenty years of regulation, to permit regulation of a transaction expressly exempted by Congress in §1(b). No interpretation of general phrases in one section of an Act can ever justify the violation of express prohibitions in another section—particularly the very one that outlines and defines the Commission's scope of jurisdiction.

Finding no support for its position in the Act or in any decided case, the Commission's brief seeks refuge in the legislative history of the Act, but of all the thousands of words that have been recorded in Committee hearings and reports and in the Congressional Record about the powers of the Commission and the purposes of the Act, not one quotation is found for the principle that the Commission can deliberately strike down an exempt sale by use of its certificate powers over transportation, or that Congress intended to grant the interstate pipelines a monopoly in purchasing natural gas to be used outside the producing state.

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with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * *

Section 7(e), 56 Stat. 84 (1942), 15 U. S. C. 717f(e):

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The Commission's present brief urges it has the power to "consider" a broad spectrum of factors including matters outside its jurisdiction. We do not contend that the Commission may not consider matters outside its jurisdiction so long as those matters are relevant to, and its subsequent action is within, the specific regulatory duties assigned by the Congress to the Commission under the Natural Gas Act.

In certificating a pipeline expansion, the Commission properly receives evidence from the distributing company as to the adequacy of the market to sustain the investment in the pipeline. To "consider" such a factor is, of course, proper. To deny the certificate, however, on the ground that the rates of one of the distributing companies under the jurisdiction of local regulatory bodies are excessive, would be clearly improper. Such action, however, is comparable to the Commission's denial of the certificate to Transco herein.

Similarly, the Commission "considers" plans for financing pipeline extensions, though it has no jurisdiction over the issuance of securities by the pipeline, or over the lenders, and the Commission requires proof of adequate gas reserves although this Court has held that such reserves may subsequently be disposed of by the pipeline company owning them, and that the Commission is powerless to prevent it.*

The distributing companies and the state commissions have long urged the Commission to condition certificates for producer sales. This Court accepted the distributing

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* *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949).

companies' position, having held in the *CATCO* case* that the Commission has the right to condition a certificate for a jurisdictional sale for resale by a producer with respect to initial rate until, after adequate review, the propriety of the rate can be determined. The "consideration" of a price which was within its full jurisdiction was, of course, proper, and one of the specific purposes stated by Congress to be achieved by the 1942 Amendments. It seemed unbelievable, however, that the Commission would argue that it has the power to deny a certificate for a producer's sale because the producer in question also supplies vast quantities of non-jurisdictional gas to be used as boiler fuel by electric companies within the producing state.

In the X-20 proceeding, however, the Commission did not merely consider matters foreign to its jurisdiction as an incident to its lawful ambit of regulation. It denied the transportation certificate for no reason having to do with transportation, but solely in an attempt to regulate or "to foil" the producer's lawfully exempt sale to Con Edison.

The sweep of the Commission's decision is a flat prohibition against Con Edison and all other companies similarly situated, making a direct purchase and having their gas transported in interstate commerce under any circumstances. The result is that Con Edison and all others, except the pipe lines, have been permanently barred from making direct purchases of gas in another state through the medium of prohibiting interstate pipelines from increasing their capacity to transport such gas for the account of its owner. The only alternative left to

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* *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378 (1959).

such a purchaser, which would generally be impractical or impossible, would be to build its own private pipeline, or as the Examiner here suggested, to condense the volume of the gas and transport it in tanks.* The Commission's action would leave the field of purchase free to interstate pipelines—an anomalous result that would undoubtedly shock the framers of the Act, whose greatest concern was the unregulated and allegedly monopolistic activities of these same pipelines. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610 (1944).**

Paradoxically, the Commission, in attempting to demonstrate the broad range of matters that it may "consider", cites *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 754 (D. C. Cir. 1956), for the proposition that the Commission, in denying a certificate, could not "ignore the 'national policy' against monopoly expressed in the antitrust laws * * *"***. Yet in X-20 the Commission's "consideration" of the supposed consequence of Con Edison's direct purchase led it to enforce a monopoly contrary to the policy of the anti-trust laws to foster competition.****

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* If, however, Con Edison had built its own pipeline from Texas to New York to transport its gas for its own consumption it would, according to Commission precedent, have been free of Commission jurisdiction and not required to obtain a certificate, *The Montana Power Co.*, 10 F.P.C. 950 (1951).

** See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (D. C. Cir. 1948), where the Court noted:

"* * * nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition * * *" (p. 884).

*** R. 186a-187a.

**** Att'y. Gen. Nat'l. Comm. Antitrust Rep. 1 (1955) ("The general objective of the antitrust laws is promotion of competition in open markets").

A correct determination, and the only one consonant with the national policy of the antitrust laws to foster competition (assuming the Commission may ignore the express exemptions of §1(b)), would be to permit Con Edison to compete. Excluding Con Edison from the market is a restraint of trade, which if practiced by the pipelines or the producers or both would clearly be an illegal trade boycott proscribed by the Sherman Act.* *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600 (1914); *Associated Press* v. *United States*, 326 U. S. 1 (1945).

Sight must not be lost of the peculiar structure of the natural gas industry. At one end of the long lines are the producers who, subject to state conservation laws, own the gas in place. At the other end are the state-regulated distribution utilities who have the dual object of obtaining sufficient gas for their customers' needs at the most reasonable consistent price. These are the real parties in interest. In between are the pipelines, the middlemen who bring the producers' gas to the distribution companies. To date their costs of purchased gas have been passed on to the distributors without serious question. The Commission has now decreed the universal policy that pipelines are to have a complete monopoly in negotiating with the producers for gas for out-of-state consumption. Under these circumstances, it is not unreasonable to fear that the sheltered position of the pipelines which permits them to pass on their gas purchase costs could lead to the very excesses that anti-trust statutes attempt to thwart by the effectiveness of competition.

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* 26 Stat. 209 (1890), as amended, 15 U. S. C. §§1-7, 15 (1952) (Supp. IV, 1957).

Such policy however, is beyond the ambit of the Commission and one which Congress would have to pass upon—if, in fact, the Commission's policy does not violate existing anti-trust statutes.

The Commission relies upon this Court's decision in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581 (1945), as authority for its prohibition of Con Edison's non-jurisdictional purchase of natural gas in Texas. This points up the Commission's apparent misconception of the difference between, on one hand, the Commission's authority to consider a non-jurisdictional fact for a lawful purpose and, on the other hand, the absence of that authority to consider and act upon a non-jurisdictional fact for the purpose of controlling a transaction over which it has not been granted jurisdiction. In that case the Commission had considered, for the purpose of fixing rates, the cost of facilities outside its jurisdiction. The Court approved the Commission's action. The case did not involve, however, an attempt by the Commission to discourage, prohibit or regulate the Company's non-jurisdictional activities by the manner in which it fixed rates. Such attempt would, obviously, have been unlawful.

Mr. Justice Jackson in his concurring opinion noted that he would have held the Commission had exceeded its jurisdiction if the Commission had imposed regulation upon the non-jurisdictional portions of the subject Company's business but, as he points out, "the orders in question have no immediate 'impact' upon production or gathering of gas" (324 U. S. 581, 609). Mr. Justice Jackson correctly recognized that in many instances lawful regulation will have a necessary and indirect effect upon some matter outside the Commission's jurisdiction. How-

ever, that is not the case here. No defect was found by the Commission in Transco's proposed X-20 service. Con Edison's purchase of gas in Texas was not the indirect casualty of a legitimate exercise of the Commission's powers. Instead it was the intended casualty of an illegal exercise by the Commission of its certificate authority.

Similarly, the *CATCO* case* provides no support for the Commission's contentions. The certificate power of the Commission was not enlarged by that decision to permit control of non-jurisdictional matters. The Commission was merely told by the Court that when certificating a sale for resale by a producer subject to its jurisdiction, that it should take into account the level of the rate, also subject to its jurisdiction, at which the sale was to be made.** The statement of the Court that "Section 7(e) requires the Commission to evaluate all factors bearing on the public interest" referred in that case to jurisdictional rates and does not, by implication or otherwise, mean that the Commission should "consider" and thereupon strike down transactions expressly excluded from the Commission's jurisdiction by the Natural Gas Act.

The impropriety of the Commission attempting to accomplish indirectly what it cannot accomplish directly has been recognized by the courts and by the Commission itself***. In *Panhandle Eastern Pipe Line Co., et. al,*. 15 FPC 46 (1956), when faced with the problem of whether

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* Footnote on p. 32, supra.

** This requirement is consistent with our position and with the legislative history of the 1942 amendments to the Act. By these amendments the Commission was given "an opportunity to scrutinize * * * the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand." H. R. Rep. No. 1290, 77th Cong., 1st Sess., 2-3 (1941).

*** *Federal Power Commission* v. *Hope Natural Gas Company*, supra; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (3rd Cir. 1950).

to condition the issuance of a certificate to a pipeline upon the requirement of an increase in service, which would in turn require the pipeline to enlarge its facilities, the Commission stated:

> "To impose such a requirement would put us in the position of doing indirectly what we are forbidden to do directly. Familiar rules of law and our own regard for a proper observance of the limitations which Congress and the courts have placed upon our authority both restrain us from pursuing such a course" (p. 57).

Translated into terms of statutory interpretation, the question of whether the Commission has power deliberately to prevent a Congressionally exempted purchase is the question of whether §7 of the Act negates the express limitations on the Commission's jurisdiction imposed by §1(b). This Court held it does not in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949), where the Commission, relying upon the broad language of §7 as well as upon other sections of the Act, had tried to prevent the transfer of substantial gas reserves by Panhandle. The reserves had previously been included in applications for certificates made by Panhandle and the Commission had granted the certificates in reliance upon their existence. This Court stated:

> "Nothing in the sections [4, 5 and 7] indicates that the power given to the Commission over natural-gas companies by §1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. • • • The power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions." (p. 508)

This Court further stated at page 509:

> "To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress."

This Court exhibited considerable prescience when it asked in a footnote:

> "Would it soon be contended that statutory power to require extension of service, §7(a), included power to require exploration or acquisition of leases *or allocation of production to interstate pipe lines in order to serve the public interest*?" (p. 509, emphasis supplied.)

This Court concluded that opinion by calling to the attention of the Commission that its remedy lay with the Congress rather than the courts.

The Commission is well aware of the limited powers it has been granted under the Natural Gas Act and it knows that as a creature of Congress it may only obtain additional powers through action of Congress. Perhaps the most strikingly vulnerable feature of the Commission's position is, in the final analysis, the fact that the Commission has asked Congress again and again for amendatory legislation that would give it authority over sales for consumption by the purchaser and over certain conser-

vation matters.* Each time Congress has refused to grant the authority requested.

The Commission cannot now fairly claim after its repeated requests to Congress and after its repeated failures to obtain such enlarged jurisdiction from Congress, that Congress intended to grant it such powers in the 1938 Act or the 1942 amendments. And regardless of how the Commission may chafe at the restraints of the Natural Gas Act, it cannot by administrative action, or by broadening its interpretation of §7, negate the limiting words of §1(b) of the Act.

II

The Court of Appeals correctly held that the Commission had exceeded its authority in denying a certificate upon the secondary or "non-determinative" ground that it had authority over and disapproved of Con Edison's non-jurisdictional use of its natural gas.

The Commission stated that one of the factors militating against issuance of a certificate to Transco, although not the determinative factor, was Con Edison's proposed utilization of the natural gas purchased in Texas for the generation and distribution of electric power and steam, with the consequent reduction of air pollution at Con Edison's Waterside station.

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* FPC 31 Ann. Rep. 145; (1951)
FPC 32 Ann. Rep. 152; (1952)
FPC 33 Ann. Rep. 154; (1953)
FPC 34 Ann. Rep. 170; (1954)
FPC 35 Ann. Rep. 182; (1955)
FPC 36 Ann. Rep. 18; (1956)
FPC 37 Ann. Rep. 24; (1957)
FPC 38 Ann. Rep. 16; (1958)
FPC 39 Ann. Rep. 19; (1959).

The lower Court, after a precise and painstaking examination of the legislative history of the Natural Gas Act and all of the Commission and Court decisions touching upon the question, concluded that Congress had not vested the Commission with the authority to pass upon and indirectly prohibit Con Edison's proposed use of its gas and that the Commission was in fact attempting to exert a conservation power which Congress had refused to grant to it.

This secondary legal issue before this Court with respect to the Commission's authority over Con Edison's use of its natural gas in New York City is a relatively narrow one: does the Commission have the power to deny a certificate for the interstate transportation of natural gas on the ground that the ultimate non-jurisdictional use of such gas does not meet with the Commission's approval even though the gas in question became the property of the owner prior to its transportation in interstate commerce and was not purchased from the pipelines subject to Commission jurisdiction? This question has properly been labeled as the "end use" issue. A broader characterization of the question, however, has been applied both in the briefs and in the opinion of the lower Court, where the matter at issue has been referred to at times as the question of the Commission's "conservation" power. The Commission apparently assumed that the prohibition of a particular end use thereby conserves natural gas for utilization in some other manner, by some other entity, and in some other place, which in the Commission's belief might be "superior" in person, place, or use. In any event, for purposes of this proceeding, the distinction between end use and conservation is not significant because the Commission was not granted any conserva-

tion power by Congress, either in the broad sense or in the narrow sense of control of end use.*

As a matter of statutory construction it is not necessary for this Court to go beyond the explicit and unambiguous terms of the Act itself. Subsections (b) and (c) of Section 1 of the Act exempt from the Commission's jurisdiction Con Edison's direct purchase of gas in Texas and its consumption of such gas within the boundaries of the State of New York where Con Edison is subject to the regulatory jurisdiction of the New York Public Service Commission. Nothing in §7 of the Act, under which the Commission denied Transco's X-20 application herein, directly or by implication overrides the plain language of §1(b). Nothing in §7 or elsewhere in the Act vests the Commission with the power to consider and directly or indirectly prohibit the ultimate utilization of natural gas by its owner. There is no statement in the statute which suggests that Congress intended to enact a national fuels policy or any indication that one locality, use or user of natural gas is to be preferred to another.

Congress, in §11 of the Act, specifically left conservation matters to the states and limited the powers and duties of the Commission in that regard to the assembling of current information concerning state compacts and the reporting of such information to Congress. §11 is the only place in the Act where the word "conservation" appears. In the light of the unequivocal language of the Act, we submit that this Court should determine, without the necessity of further investigation, that, as the Court

* For purposes of simplification, we will in most instances in this section of the brief simply refer to the broad term "conservation", since, if the Commission does not have any conservation power, it quite obviously would not have any control over end use.

of Appeals held, the Commission does not possess and may not exercise a conservation power. Certainly it is not authorized to control the nature of the use of gas by an owner who has lawfully made a direct purchase thereof from the producer.

The Commission's brief rejects this basic canon of statutory construction and turns to the legislative history of the Act in the hope of there finding some support for its position. Challenging the detailed and comprehensive analysis of the legislative history of the 1938 Act and the 1942 amendments thereto, set out in the opinion of the lower Court, the Commission's brief sets forth a separate statement of the Act's history. This statement contains significant omissions. We therefore feel obliged to show those omissions. Fairly read, the legislative history corroborates the plain meaning of the Act. It shows that Congress was aware of the problem of conservation and that it reserved the resolution of such problem to the States by the provisions of §11 of the Act. It shows that it was the opinion of the members of the Federal Power Commission, subsequent to enactment of the Natural Gas Act in 1938, and after enactment of the 1942 amendment, that the Commission did not possess the conservation powers for which it argues in this case.

Legislative History

The 1938 Act

The Commission in its brief states categorically that the Natural Gas Act of 1938 and the 1942 amendment lodged a consideration of questions of end-use with the Commission (FPC brief, pp. 27-28). Its brief, however, is completely devoid of any reference to primary legislative sources relating to the 1938 Act such as committee

hearings, committee reports or statements of members of Congress which support such assertion. It relies instead upon inconclusive general comment in the earlier 1936 report of the Federal Trade Commission. The Federal Power Commission's brief fails to include, although brought to its attention in the proceedings before the lower Court, any reference to the only section of the Act containing the word or concept of "conservation" *i.e.* §11. It fails to report the statement of Congressman Mapes, a member of the committee that was responsible for the bill under consideration,

> "The only provision in the bill which seems to look to the conservation of the natural gas resources of the country is contained in the provision relating to the State compacts." (81 Cong. Rec. 6726 (1937))

The brief of the Commission also fails, with respect to conservation, to report the following colloquy between Senator Wheeler, Senate sponsor of the legislation and Chairman of the committee handling its enactment, and Senator Austin:

> "Mr. Wheeler. • • •
>
> "In other words, all the bill would do would be to give the Commission power to furnish to the States such information as it has, and require the States to furnish the Commission such information as they have. Then the Commission would report to the Congress its recommendations with reference to the compacts, and it would be for the Congress to act.
>
> "Mr. Austin. Then, it would leave to the future the right to meet any effort on the part of the central government to acquire the natural resources of the State of Montana, or the State of Vermont, or any other State?

"Mr. Wheeler. Oh, yes. It does not touch it in any way, shape, or form, except to require the furnishing of information.

"Mr. Austin. I have great fear of these occult methods of acquiring the natural resources of our several states" (81 Cong. Rec. 9312 (1937)).

The Commission's brief relies solely upon the 1936 report of the Federal Trade Commission to Congress concerning the natural gas industry. As the lower Court observed, that report, consisting of more than 600 pages, touches only briefly on the question of conservation. A more precise reading of the report reveals that the quotations contained in the Commission's brief as to the conservation concern of the Federal Trade Commission related almost wholly to wasteful practices in the producing areas, such as the flaring of natural gas, and its use in gasoline extraction and the manufacture of carbon black.*

The Commission brief states that the "Trade Commission did not offer final answers to the end-use problems which its investigation raised" (FPC brief, p. 27). A more accurate and complete statement would be that the only *recommendations* of the Trade Commission which in any way related to conservation were the recommendations that the producing states should enter into compacts with each other providing for State regulation of conservation, that the federal government should make recommendations as to production volumes and that the Congress should assist in enforcement of the State laws by barring from interstate commerce any quantities of natural gas exceeding the volume set by State regulation.

* Federal Trade Commission, *Final Report to the Senate of the United States*, S. Doc. No. 92, 74th Cong., 1st Sess., Part 84-A, 125-126, 608 (1936).

These recommendations, but substantially modified, formed the basis of §11 of the Act.

The actual final recommendations of the Federal Trade Commission on this subject in fact are to the direct contrary of the general discussion set forth in the quotations relied on by the Commission brief herein. Such testimony was supplied by William Chantland, the attorney who directed the Trade Commission's investigation and who was authorized to appear as its spokesman before the subcommittee of the House Committee on Interstate and Foreign Commerce. Colonel Chantland testified that the federal government should not attempt directly to regulate the natural gas industry for conservation purposes, but rather should act merely in aid of State laws.*

In sum, there is not a shred of evidence to indicate that Congress intended to give the Commission any conservation power whatever other than as prescribed in §11. There is no foundation for the present claim that the Commission was to classify uses of natural gas as superior or inferior and grant or deny certificates on the basis of such classification. To the contrary, Congress recognized that there would be consumption of natural gas for "domestic, commercial, industrial" and other uses (§1(b)) and no preference for any particular use was expressed, but instead direct sales for consumption by the purchaser of the type here involved were excluded from all regulation and rates for sales for resale for industrial or boiler fuel use were exempted from the Commission's authority to suspend rates pursuant to §4(e) of the Act. By enacting §11 the Congress demonstrated that it was aware

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* *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 74th Cong., 2d Sess., 66-67 (1936).

of the problem of conservation and that it intended to leave the control of conservation in the hands of the States* in accordance with the only recommendation on the subject by the Federal Trade Commission and its official spokesman. No possible ground for Commission action in the field of conservation appears in the 1938 Act or its legislative history.

The 1940 Annual Report of the Commission to Congress** reported the Commission's dissatisfaction with its limited powers in this specific respect under the Natural Gas Act. The Commission expressed its concern with its inability to deal with problems of conservation and recommended that the Natural Gas Act be broadened to provide the Commission, among other things, with the power to resolve conservation problems. The Commission's Brief now claims that the Commission's 1940 admission of its lack of conservation power was the basis of the action taken by Congress in amending the Act in 1942, although there is no support for this position in the legislative history of these amendments.

This seems strained to the point of absurdity. The 1940 report advised Congress that the Commission lacked power over certain interstate pipeline expansions, power to consider the effect of expansions on other fuels, and power

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* This Court has recognized that such power rests in the States in decisions both preceding and following enactment of the Natural Gas Act. See *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210 (1932); *Walls* v. *Midland Carbon Company*, 254 U. S. 300 (1920) and *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940). In these cases this Court sustained the right of the States to adopt and enforce legislation designed to conserve natural reserves including natural gas.

** 20 FPC Ann. Rep. (1940).

over conservation.* The 1942 amendments were submitted for and related solely to purposes other than conservation.

As the lower Court found, neither the 1942 amendments nor the legislative history support the Commission's contention. The Commission's 1940 report does no more than confirm its recognition as of that time that the 1938 Act did not endow the Commission with the powers here claimed, and the Congress, having had the lack called to its attention, did not see fit to grant the authority sought.

The 1942 Amendments

The Commission's brief relies heavily upon the 1942 amendments to the Act to support its argument that the Congress intended to vest conservation powers in the Federal Power Commission. However, a detailed analysis of the amendments, the Committee hearings and the Committee reports fails to reveal a single mention of the conservation question. In fact, as far as we can determine, the word conservation was not mentioned by any witness except in connection with a proposed amendment that was rejected by that Committee.

The changes of the Natural Gas Act effected by Congress in 1942 consisted solely of a revision of §7(c) and the addition of §§7(d), (e), (f) and (g). For the convenience of the Court, and to permit comparison, §7(c) as originally enacted and the 1942 amendments to the Act are set forth in an appendix to this brief. It will be observed that the Commission's present contentions with respect to the significance of the 1942 amendments are not borne out by the statutory language used by Congress. There is no

* 20 F.P.C. Ann. Rep. 78-80 (1940).

mention of a grant of conservation power to the Commission. The only topic which remotely related to conservation was the intent, as appears in the Report of the House Committee, that the Commission, in weighing the effect of a proposed pipeline expansion, might consider the effect upon the producers or the carriers of competing fuels. This merely meant that if new or additional gas was to be used in a locality, for whatever purpose, the Commission might consider the economic impact on competing fuel interests.

Chairman Basil Manly of the Federal Power Commission testified before the House Committee on Interstate and Foreign Commerce and had full opportunity to press the Commission's request previously made to Congress in the 1940 report. Significantly, he did not do so.*

The report of the House Committee summarized the new matters which the bill would authorize the Commission to consider in a certificate proceeding upon the adoption of the amendments, as follows:

> "The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. • • •
>
> "The bill, as amended, eliminates the objections to the present section 7(c) above mentioned. By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of con-

* *Hearings before House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 3-6 (1941).

> struction and extensions upon the interests of producers of competing fuels and competitive transportation interests. This result is accomplished, moreover, without undue disturbance of existing operating arrangements of natural-gas companies." (H. R. Rep. No. 1290, 77th Cong., 1st Sess., 2-3 (1941)).

Clearly, the primary purpose of the 1942 amendments was to extend the certificate power to cover all interstate pipeline expansions, to permit intervention in Commission proceedings by producers and carriers of competing fuels and to permit consideration of the impact of any pipeline extension upon such fuel producers and their carrier interests.

The coal and transportation interests were concerned solely with the loss of business. It made no difference to them whether coal was displaced for domestic purposes or to relieve air pollution. It was the loss of market that hurt, not the nature of the sale, or the character of the end use.

In this connection, it should be noted that although the coal interests participated actively in the hearings in this case before the Commission, they did not introduce any evidence to show damage through loss of market, and the Commission did not premise its decision upon the ground that the use of natural gas at the Waterside station would have an adverse effect upon competing fuels. Such adverse effect on the producer, and not the specific end use in substituting gas for existing fuels, was the only consideration within the scope of the 1942 amendments. The power granted the Commission to consider the effect on competing fuels cannot be equated with the power to act as an arbiter of the intended end-use of the supplanting natural gas.

That the 1942 amendments did not extend the Commission's jurisdiction to include matters of conservation was recognized by the unanimous views of the Federal Power Commission, published in 1944, after more than a year's experience in administering the Act under the 1942 amendments. The Commission reported to Congress, in a document entitled "The First Five Years Under the Natural Gas Act", that in hearings on pipeline certificate cases under §7 of the Act, as amended, coal, railroads, lumber and other interests had intervened and had "strongly urged the Commission either to deny certificates on the general grounds of conservation, or to attach restrictions which would severely limit the uses for which natural gas might be sold".

The Commission went on to say:

> "It has been the unanimous view of the Commission that, inasmuch as the Congress had not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and has granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, it was the duty of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise."*

In a footnote to the above quoted statement the Commission cited its decision in *Tennessee Gas and Transmission Company*, 3 F.P.C. 574 (1943). That case involved certification of a pipeline from Texas to West Virginia. The coal interests complained that the proposed use of natural gas for industrial and space heating purposes

* FPC, The First Five Years Under the Natural Gas Act, 15 (1944).

was a dissipation of the natural gas resources and threatened the coal industry with ruinous competition. The Commission stated:

> "'We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. *It appears, therefore, that the Natural Gas Act does not vest this Commission with complete and comprehensive authority which would permit us to act as arbiter over the end uses of natural gas.*' (pp. 578-579)" (Emphasis supplied.)

As the Court below comments, "this report* followed closely on the heels of the *Hope* decision on which the Commission so heavily relies" (R. 316(a)). The Commission in its brief in the instant case, however, attempts to explain away the foregoing statements of the Commission in 1944 by arguing that the Commission did not mean that it had no power to deal with conservation, but merely that it did not have a "comprehensive" power over conservation and end-use. The Commission's contention is fallacious. It is perfectly obvious that if, as the Commission now claims, Congress "accepted" the Commission's Annual Report for 1940, when it amended the Natural Gas Act of 1942 (FPC brief, page 37), then the Commission would not in 1944 have complained that the power it had requested in 1940 was not sufficiently compre-

* *Id.*, at 15.

hensive. The fact of the matter is that the Commission had been granted no power whatever in this area, and if, as the Commission said in 1944, it did not then have the authority to "act as arbiter over the end-uses of natural gas" it does not have such power now, since there has been no amendment of the Act on that subject in the interim period.

After 1945 the Commission pursued a somewhat inconsistent course. On the one hand, under continuing pressure from the coal interests, the Commission began to insinuate into its decisions statements to the effect that the use of boiler fuel was an inferior use and might weigh against the granting of a certificate, although in almost all cases it proceeded to certificate the transaction for such allegedly "inferior" boiler fuel purposes. On the other hand, being aware of the complete lack of legislative authority to allocate natural gas on an end-use basis, the Commission continued to request Congress for control over end use.

In its Annual Reports for 1951, 1952, and 1953, the Commission recommended that §7(c) be amended "to provide specifically for control by the Commission of the end use of natural gas when required for national defense or to safeguard the available supply." * * *"*

In each of the years 1954 through 1959 the Commission requested, in its Annual Report, that §7(c) be amended to provide specific authority to allocate natural gas for defense purposes or to safeguard the supply for emergencies.**

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* 31 FPC Ann. Rep. 145 (1951), 32 FPC Ann. Rep. 152 (1952), and 33 FPC Ann. Rep. 154 (1953).

** 34 FPC Ann. Rep. 170 (1954), 35 FPC Ann. Rep. 182 (1955), 36 FPC Ann. Rep. 18 (1956), 37 FPC Ann. Rep. 24 (1957), 38 FPC Ann. Rep. 16 (1958), and 39 FPC Ann. Rep. 19 (1959).

Pursuant to the Commission's request in its 1958 Annual Report, a bill was introduced in Congress which would add the following language to §7(e):

> "and, when the public convenience and necessity so requires, the Commission shall be authorized to allocate the available supply of natural gas authorized to be transported or sold by a natural gas pipeline company under such certificate, for utilization in such areas or for such purposes as afford the most advantageous benefits to the public." (S. 2252, 86th Cong. (1959), introduced by Senator Magnuson).

The Commission also requested in 1952 and 1953 that §1(b) be amended to vest jurisdiction in the Commission over direct sales in interstate commerce of natural gas for industrial use.*

The Court's attention is called to the language of the bill introduced by Senator Magnuson, quoted above, since it expresses exactly the type of authority that would be required by the Commission for it to take the action which it has taken in the instant case.

The significant matter is that Congress, faced with these requests for 8 consecutive years for the very authority and jurisdiction the Commission now claims to possess, refused to grant them in any detail or respect. There can be no more compelling legislative history or demonstrated Congressional intent that a regulatory body lacks a specific jurisdiction, than when it has pointed to the lack in its reports in 1940 and 1944 and requested the grant in 1951 through 1958 and Congress has denied it year in and year out.

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* 32 FPC Ann. Rep. 152 (1952) and 33 FPC Ann. Rep. 154 (1953).

It is also noteworthy that the nature of this power which Congress refuses to grant relates to the allocation of the nation's fuels, as pointed out by the Court of Appeals. During this same span of years, Congress has been wrestling with the development of a National Fuels Policy akin to the National Transportation Policy which affects the application of the transportation acts.* Until such guiding principles are established as a result of the Congressional Committee hearings, it is both natural and orderly that Congress refuse to permit the Commission to exert jurisdiction as to natural gas which may upset the ultimate plan and balance of the whole relationship of the nation's competing fuels.

Commission and Court Decisions Relating to Conservation

This case represents the first instance in which the Commission has denied a certificate upon the ground of allegedly inferior end-use and such denial has been contested in the courts. In fact, the Commission has denied an application for a certificate on this ground in only four instances in its entire history, and in only one of these did the denial remain completely unchanged. In that proceeding, Court review was not sought on that point. The Commission cases involving boiler fuel sales, in which the use is mentioned as a factor are collected and discussed in the lower Court's decision (R. 316a-318a).**

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* S. Con. Res. 73, 86th Cong. (1959).

** The Commission granted certificates in the following cases: *East Tennessee Natural Gas Co.*, 8 F. P. C. 836 (1949), *aff'd sub nom., National Coal Ass'n.* v. *Federal Power Commission*, 191 F. 2d 462 (D. C. Cir. 1951) (use as boiler fuel by Atomic Energy Commission); *Transcontinental Gas Pipe Line Corp.*, 11 F. P. C. 605, 615 (1952) (use as boiler fuel by a power company); *Texas Gas Transmission Corp.*, 12 F. P. C. 658 (1953) (use as boiler fuel by a power

The three cases reaching the courts* in which the Commission's power to control end-use was discussed were all proceedings involving the use of boiler fuel in which the Commission had granted certificates, and had defended its action on review brought by other interests. All of the

company); *Mississippi River Fuel Corp.*, 12 F. P. C. 109, 114 (1953) (use as boiler fuel by a power company); *Southern Natural Gas Co.*, 14 F. P. C. 243 (1955), *aff'd sub nom., Charleston & Western Carolina Railway Co.* v. *Federal Power Commission*, 234 F. 2d 62 (D. C. Cir. 1956) (use as boiler fuel by power company); *Northern Natural Gas Co.*, 15 F. P. C. 682, *rev'd* 15 F. P. C. 1634 (1956), *aff'd sub nom., National Coal Ass'n* v. *Federal Power Commission*, 247 F. 2d 86 (D. C. Cir. 1957) (use as boiler fuel by a power company); *Houston Texas Gas & Oil Corp.*, 16 F. P. C. 118 (1956) (use as a boiler fuel by two Florida power companies); *Cities Service Gas Co.*, 17 F. P. C. 516 (1957) (use as boiler fuel by a power company); Memphis Natural Gas Company, 4 F.P.C. 197 (1944).

The Commission originally denied a certificate in *Northern Natural Gas Co.*, 4 F. P. C. 1099 (1945), but subsequently granted a certificate in the same proceedings, 7 F. P. C. 296 (1948).

The Commission denied a certificate in another case; *Piedmont Natural Gas Corp.*, 9 F. P. C. 629, 70, 83-90 (1950), but the customer seeking the gas was ultimately successful in obtaining it, *Transcontinental Gas Pipe Line Corp.*, 11 F. P. C. 605, 615 (1952).

In *Texas Gas Transmission Corp.*, 10 F. P. C. 391 (1951), a pipeline's application to supply boiler fuel gas to two customers was denied, but the pipeline was eventually granted a certificate to supply one of them, *Texas Gas Transmission Corp.*, 12 F. P. C. 658 (1953).

In *Panhandle Eastern Pipe Line Co.*, F. P. C. Opinion No. 274 (1954), *aff'd on other grounds, sub nom., Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467 (3d Cir.), *cert. denied* 352 U. S. 891 (1956), certificates were granted for service to three industrial companies and were denied for service to a fourth, a paper company.

* *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462 (D. C. Cir. 1951); *Department of Conservation* v. *Federal Power Commission*, 148 F. 2d 746, *cert. denied* 326 U. S. 717 (1945); *Charleston & Western Carolina Railway Co.* v. *Federal Power Commission*, 234 F. 2d 62 (1956).

cases, unlike the instant case, involved sales by pipelines of their own gas. In each instance, the Commission's action was upheld by a Court of Appeals and in none of the cases does it appear that an analysis of the Commission's powers bearing on the point at issue herein and the legislative history relating thereto was made. The three Court of Appeals cases which touch on the subject were considered by the lower Court in its decision and rejected as precedents (R. 318a-319a).

The questions at issue here have never been presented to, or passed upon, by this or any other Court. The Commission in its brief cites *dicta* in the opinions of this Court in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944) and *Federal Power Commission* v. *East Ohio Gas Company*, 338 U. S. 464 (1950). In neither case, however, did the Court rest its decision upon the language cited by the Commission. The *Hope* case was a rate case under the 1938 Act and did not involve the Commission's certificate powers under either the 1938 Act or the 1942 amendments thereto. One of the fundamental questions confronting this Court was whether the Commission under the rate provisions of the Act, §§4 and 5, could fix rates that would disallow or discourage resales for industrial use. The Court found that the Act provided for rate regulation along recognized and more or less standard lines, and that to require the Commission to fix rates in order to discourage particular uses would be to inject into rate cases a "novel" doctrine without any express statutory sanction (p. 616).

The same basic principle is controlling in this case. The conventional standards of the certificate section of the Natural Gas Act make no provision for the control directly or indirectly of the direct industrial sale of natural

gas or the use by its owner thereafter. In the *Hope* case this Court could find no basis in the legislative history of the Act to sanction the extension of the standard of justness and reasonableness to permit the discouragement by rate fixing of *jurisdictional* resales for industrial use. Applying the same rule of statutory construction this Court should find that the standard of "public convenience and necessity" like that of "just and reasonable" should not be stretched to encompass the regulation of matters specifically exempted from Commission jurisdiction by Congress.

The *East Ohio* case, quoted by the Commission in its brief at page 39, was not concerned with whether the Commission did or did not have conservation power. It concerned the extent and applicability of the Commission's jurisdiction over the transportation of natural gas in interstate commerce and provides no support for the Commission's position in this case.

The Commission in its brief has been unable to direct this Court's attention to any decision which held that the Commission has any conservation or related power. The Commission has been unable to unearth any support in the legislative history for its contention that it has authority over conservation matters. It has failed to explain why it has requested and Congress has refused to grant the very powers which it purported to exercise in this case. The statute is unambiguous that the Commission has no conservation power other than in §11. It appears, therefore, clear beyond any doubt that the ruling of the lower Court on this point, which was adverse to the contentions of the Commission, was correct and should be sustained.

Con Edison cannot be deprived by the Commission of its right to use its lawfully purchased Texas gas.

III

The Commission's order is arbitrary, capricious and unlawful because it is based upon "policy considerations" that are unsupported by any substantial evidence of record and contrary to experience and reason and to the express policies of Congress.

By well established legal standards, and wholly apart from the questions of Commission authority discussed in Points I and II, *supra,* the Commission's action in denying Transco's X-20 application was arbitrary.

The Commission was asked to decide this case upon a record in which all of the evidence supported the proposed service and none was offered in opposition. All of the previously established requirements for a pipeline certificate had, as conceded by the Commission, been met (R. 178a, 215). In addition to the evidence of the kind customarily presented in a pipeline certificate case, which demonstrated the adequacy of reserves, financeability of the project, the market and other related matters, a full showing was made at the hearing of the compelling reasons in the public interest for authorization of the proposed peaking and transportation service: the reduction of air pollution in Manhattan, the substantial savings to Con Edison's electric and steam customers resulting from the use of natural gas at the Waterside station, and the much needed and inexpensive peaking service designed to meet the needs of Con Edison's gas customers. Against this wealth of evidence favorable to issuance of a certificate to Transco, the Commission had no evidence of record to weigh in the balance except the

simple fact that Con Edison planned to reduce air pollution by burning natural gas instead of coal at its Waterside plant to generate electricity and steam for distribution to the public.

Even assuming *arguendo* that the Commission could properly dictate Con Edison's proposed use of its own natural gas, the Commission could not, consistent with the record before it, deny the certificate solely upon this ground.

The Commission's flagrant disregard of the evidence of record and its reliance upon unsubstantiated and patently erroneous "policy considerations" as the grounds for its decision exceeded the limitations upon agency action prescribed by the Administrative Procedure Act* and the Natural Gas Act.**

As stated in *Mississippi Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433, 439 (D. C. Cir. 1947): "• • • Congress has forbidden arbitrary action and has imposed upon the Courts a duty of review in that respect. Arbitrary action, if it means anything, means action not based on fact or reason • • •".

What the Commission did was to discard the general certificate requirements prescribed in the Act that had been particularized in the legislative history and through years of Commission practice and substitute in their stead new standards not based either upon evidence or experience. Since the Commission had never previously premised a decision upon the so called "policy considerations" here involved, respondents had no opportunity to present evidence that would demonstrate the Commission's error.

* §9, 60 Stat. 243 (1946), 5 U.S.C. §1009.

** §19(b), 52 Stat. 831 (1938), 15 U.S.C. §717(r).

The Commission now defends its action as a permissible exercise of its expertise, but the courts have held that "expertise" cannot be substituted for evidence. In *Capital Transit Co. v. Public Utilities Commission of District of Columbia*, 213 F. 2d 176, 187 (D. C. Cir. 1953) the Court stated: "• • • The 'expertise' of a commission usefully serves it in evaluating the evidence but that expertise cannot supply evidence and cannot without findings made upon the critical issues before it, guide a commission to a rational and lawful decision."

The lower Court has discussed each of the so-called "policy considerations" in detail. It is not necessary to recount the errors in the Commission's reasoning there pointed out. The Commission in its brief has attempted by rhetoric to buttress the rationale of its opinion. The argument in the brief, like that in the opinion, however, is marked by the absence of supporting facts, either within or without the record.

Rather than reargue each of the "policy considerations" we will address ourselves to the fundamental fallacy upon which the Commission's entire argument is built: the erroneous assumption that the issuance of a certificate to Transco for the X-20 service would open the flood gates to a vast unregulated interstate market from which would flow the alleged evils enumerated in the Commission's opinion. If, as we shall demonstrate, the Commission is wrong in its basic assumption, and the practice of purchasing gas directly in the field for consumption by the purchaser is to be adopted only by those few companies having special problems, such as Con Edison, then the impact of such scattered purchasers upon prices and supply would, even accepting the Commission's other arguments, be negligible.

If the Commission now feels it is justified, as evidenced by its brief, in going outside the record, it can find evidence on every hand to substantiate the fact that practically no industrial consumers at any distance from the producing states would or could afford to avail themselves of the opportunity to purchase natural gas in the field and use the pipelines merely for transportation purposes. Natural gas has been used by purchasers for their own consumption for more years than the Natural Gas Act has been in effect. The transportation function of interstate pipelines as distinguished from the sale of natural gas for resale has been recognized by Congress, by the courts and has been availed of by occasional direct purchasers of natural gas for many years. There is nothing novel about the idea of purchasing natural gas in the field for consumption by the purchaser. Yet few companies have attempted such an arrangement. The reason is obvious: in most instances, the cost would be prohibitive.

Mr. Justice Jackson in his dissenting opinion in the *Hope* case noted that industrial use is induced less by the unique qualities of natural gas than by "low cost in competition with other fuels." (320 U. S. 591, 635). The fact is that natural gas is customarily used as boiler fuel for one reason and for one reason only—when and if it is cheaper than competing fuels. In order for a purchase plus transportation arrangement to be attractive to industrial consumers, it must provide a source of energy at the point of consumption that is cheaper than that provided by coal or oil. Not only must the immediate cost be less, but also, as far as can be predicted, the long range cost must be less, because the X-20 type of arrangement does not permit change from one type of fuel to another as prices fluctuate, since the purchase and transportation

arrangements, involving expansion of pipeline facilities, must be made on a long term basis.

The Commission in its brief notes that the cost of the X-20 gas is higher than the cost of coal to Con Edison. Under these circumstances it is apparent that no industry would burn X-20 gas instead of coal, absent the special circumstances of air pollution and the 60-day peaking provision.

The importance of even a slight difference in price between competing fuels is emphasized in *Midwestern Gas Transmission Company*, 21 F.P.C. 653 (1959), decided by the Commission in 1959. Evidence was there introduced that the project would not be feasible unless the commodity component of the pipelines' prices for natural gas were low enough so that distribution companies could sell gas to industrial users. This required a commodity price below the going price of gas in the field.*

Since the cost of gas has risen and continues to rise at a more rapid rate than competing fuels, the Commission's concern that industry will pay the current high field prices for natural gas and, in addition, pay for its transportation, rather than purchase coal, oil or pipeline gas, would seem to run counter to all the data now available

* The cost of X-20 gas to industry would almost invariably be higher than the cost of natural gas purchased from a pipeline since the prices charged by pipelines are based not only upon the present high cost of natural gas in the field, but also upon the relatively low cost of substantial reserves purchased many years ago by the pipelines. These low costs are averaged in with the current higher costs and result in a price of gas that is substantially less than what it would cost an industry to purchase gas in the field today and have it transported.

to the Commission and counter to the Commission's past experience.*

Although the Commission has at its disposal bulging files containing thousands of certificate applications, and has available all of the pertinent data relating to the natural gas industry as well as coal and oil prices, it has obviously been completely unable to put together a factual presentatior which would support the Commission's contention tha favorable action on the X-20 proposal will create a large, new, unregulated market. The two specific examples that it does cite prove nothing. The first is the *Houston Texas Gas & Oil Corporation* case, 16 F.P.C. 118 (1956) which involved in large part the transportation of boiler fuel purchased by a consumer in the field. Certainly, if any single Commission action could start a rush of industrial purchasers to the producing fields the favorable Commission action in the *Houston* case in 1956 would have had that effect.

The second instance cited in the Commission's brief was that involving Virginia Electric & Power Company, *Transcontinental Gas Pipe Line Corporation*, 20 F.P.C. 843 (1958). This proposal was denied by the Commission because the transportation rate was found to be too low. The project was thereafter abandoned by the Company since it would not have been economically feasible if the gas were to be transported at a higher rate. These are the only two instances cited by the Commission where the purchase of natural gas in the field for boiler fuel use has even been attempted. For the rest of its pres-

* See the statement of the then Commission Vice-Chairman Connole in 60 Public Utilities Fortnightly 843 (1957): "This indicates that if natural gas prices and coal prices on a national average basis continue their relative trends of recent years, natural gas prices will be beyond competing with coal sometime before 1960."

entation the Commission relies upon the predictions of writers in trade magazines and excerpts from daily papers and an Examiner's decision.

The references to the attempts of Southern California Edison Co. to obtain supplies of natural gas for boiler fuel do not make clear that the only purchase agreements entered into by that Company have been with pipelines and not producers. These contracts would, therefore, presumably not be subject to the same objections raised in this case by the Commission with respect to direct purchases in the field from producers. These attempts by Southern California Edison to obtain natural gas for fuel purposes had as their goal the same fundamental purpose underlying Con Edison's X-20 plan, that is, the reduction of air pollution. The smog problem in the Los Angeles area is so well known as not to require elaboration. As we have stated, it is our view that it is only in this type of situation, where the unique burning qualities of natural gas as a fuel outweigh other considerations, that purchasers will be found attempting to obtain supplies for their own consumption. The failure of the Commission to distinguish this type of situation from the ordinary industrial use of natural gas is one further evidence of the arbitrary nature of its decision.

We are sure that the Court is aware of the implication throughout the Commission brief that Con Edison is ignoring the interests of small consumers and that it stands in the position of a vast industrial user. The Commission states that the X-20 arrangement poses a threat "to the small consumer, the person for whom the protections of the Natural Gas Act were designed" (F.P.C. Brief, p. 11). As a proponent of the X-20 service, Con Edison, a large utility, is therefore cast in the role of one callously indif-

ferent to the interests of the "small consumer". This portrayal by insinuation is utter nonsense. Actually, Con Edison is in the business in the New York metropolitan area of serving approximately 1,300,000 gas customers, the great majority of whom are "small consumers", and of serving electricity to some 2,800,000 customers, and steam to over 2,000 customers.* It feels keenly its responsibility to provide all of these millions of consumers with reliable gas, electric and steam service at reasonable rates. Con Edison would be short sighted, indeed, if, as one of the largest gas distributing companies in the country, it supported a project that would have the ultimate effect of raising the cost of the gas it buys for resale. If it had had the slightest doubt about the wisdom of the proposed X-20 service it would not have pressed for review in the lower Court and would not now defend the correctness of that Court's decision. Nothing could be more unrealistic than the suggestion that this major gas distributing company would open the Pandora's box portrayed by the Commission in order to obtain natural gas as a fuel for a single electric and steam generating station.

Con Edison serves more "small consumers" than any of Transco's other customers. To discriminate against a large utility does not protect the "small consumer". It merely serves to affect adversely the interests of a larger number of the very consumers for whose protection the Natural Gas Act was passed.

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* The number of steam customers does not reflect the number of persons served by Con Edison steam heat since most "customers" are large buildings, each of which contains a substantial number of customers.

IV

The Court of Appeals correctly ordered the cases returned to the Commission with directions to issue the certificate applied for.

The lower Court set aside the Commission's order, which is the subject of this review and directed that the cases be returned to the Commission "with directions to issue the certificate applied for" subject to further hearing on a minor rate question (R. 324a-325a). The Court did so because the Commission had made it clear that it had no objection to the proposed X-20 service* except for those extra-jurisdictional matters upon which the lower Court found the Commission could not lawfully base its decision. In other words, since the Commission had indicated the acceptability of the proposed service, absent "certain policy considerations", there existed no reason for any further exercise of the Commission's discretion once such policy objections had been stripped away. The Court's action also may have reflected an awareness of the history of these proceedings before the Commission, the unreasonable delays experienced by the applicant and Con Edison, and the knowledge that relief that is provided too late is no relief at all.

Transco's original application was filed October 28, 1957. Hearings were held in the spring of 1958. The Examiner issued his decision on July 9th and thereafter the Commission, despite repeated pleas for expedition, severed and decided all but one of the other dockets from the X-20 proposal, deferring decision on the X-20 service

*Aside from the minor rate question.

until almost seven months after the Examiner's decision. The Commission's decision, when it did come on January 30, 1959, was based on "policy considerations" that required neither legal research nor study of the record and could have been expressed in a matter of days after the issuance of the hearing Examiner's decision.

The Commission in its brief states several reasons why it believes the Court below should not have ordered issuance of a certificate. None of the reasons presents any real obstacle to Commission compliance with the Court's order. All of the reasons justify the concern the lower Court might have had about the delay which might occur once the matter was back in the hands of the Commission.

The Commission now argues that the original X-20 proposal is, as a matter of engineering design, out-of-date, since Transco has continued to expand and different facilities would now be required. The Commission fails to inform this Court, however, that Transco included in its certificate application for 1960 pipeline construction (*Transcontinental Gas Pipe Line Corporation*, F.P.C. Docket Nos. G-16603 et al.) the additional facilities which will be made necessary should the X-20 service be authorized. These plans are not only on file with the Commission, but were introduced as evidence of record at the hearings upon said certificate application. Nor is it noted that the Commission in its decision in that case severed and deferred action upon those additional facilities until final disposition of the instant case. With that record before it, the Commission will be in a position to render almost immediately a decision should this case be remanded to it and there will be no justification for any further significant delays.

The Commission's other objections to the lower Court's direction involve no matters of substance requiring Commission reconsideration, but appear to be merely afterthoughts which, if recognized, may cause further and needless delay.

The Commission having found that the established requirements of a certificate for the X-20 service had been met, the case should be returned to the Commission in accordance with the order of the lower Court and the Commission should be directed to issue the certificate applied for.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October 21, 1960.

APPENDIX

ENACTED VERSIONS OF §7(c) OF THE NATURAL GAS ACT

1. Natural Gas Act, §7(c), as originally enacted June 21, 1938, by Public Law No. 688, 75th Congress, 3d Session, 52 Stat. 825:

> "(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it

being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."

2. Natural Gas Act, §7(c) as amended, and §§7(d), (e), (f) and (g), as added, by amendments enacted February 7, 1942, by Public Law No. 444, 77th Congress, 2d Session, 56 Stat. 83, 84, 15 U. S. C. §717F(c), (d), (e), (f) and (g):

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date

of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commis-

sion thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."